



Criminal prosecution on behalf of another state

1. Definition

Many states do not extradite their own nationals. To ensure that a criminal prosecution can still go ahead in such cases, it is possible to apply to have proceedings transferred, or to assume proceedings on behalf of another state. This enables the suspect to be prosecuted in their home state. The legal foundations for this are found in the national laws of each state, as well as in the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters, and in bilateral extradition and mutual assistance treaties. In Switzerland, the conditions for the transfer and assumption of criminal proceedings are laid down in the Federal Act on International Mutual Assistance in Criminal Matters. The Federal Office of Justice (FOJ, Extradition Section) is responsible for submitting and receiving applications for criminal prosecutions on behalf of Switzerland or another state.

A prosecution may be transferred only if both states have jurisdiction in the case in question. This jurisdiction may be based on the territorial principle (the offence was committed on the state's own territory), the active personality principle (nationality of the perpetrator) or the passive personality principle (nationality of the victim). Particularly serious crimes such as genocide, war crimes or crimes against humanity may be prosecuted according to the universality principle, which establishes jurisdiction irrespective of where the offence was committed or the nationalities of the perpetrator or victim.

2. Transferring prosecution to a foreign state

Cantonal public prosecutors' offices, the Office of the Attorney General of Switzerland, or other prosecuting authorities apply to the FOJ for it to make a formal request that responsibility for prosecution be transferred to a foreign state. Exceptions apply to cases involving Germany, Austria and Italy. Here, bilateral treaties permit the request to be submitted directly to the competent local prosecuting authorities.

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The prosecuting authority's application must contain the following specific information and documents:

- information on the identity, nationality and location of the suspect, in as much detail as possible (requests concerning persons unknown or persons whose location is unknown are inadmissible);
- description of the facts of the case;
- the legal qualification of the facts, and the applicable criminal provisions;
- criminal files and any evidence.

Conditions

The FOJ will examine whether or not the application satisfies the legal conditions for prosecution to be transferred abroad. In particular, the laws of the foreign state must permit the offence to be prosecuted and to be punished by the courts, the suspect must be located in the state in question, and their extradition to Switzerland must be inadmissible, or impracticable owing to the minor nature of the probable sentence, for example. In exceptional cases, the prosecution may be transferred at the same time the suspect is extradited, if transferring prosecution for other offences is expected to result in the offender reintegrating more successfully into society.

The facts of the case must be punishable under the laws of both Switzerland and the foreign state (the principle of dual criminality). Furthermore, the statute of limitations must not have come into effect for prosecution in the foreign state. A request to assume responsibility for prosecution may not be submitted to a foreign state if there is a specific risk that human and procedural rights might be compromised in that state. Finally, the severity of the offence must justify proceedings, i.e. it may not be a minor offence.

If the conditions are fulfilled, the FOJ will submit the request to the ministry of justice in the foreign state. If they are not, it will refuse to make the request. Where provision is made for direct submissions, the Swiss criminal prosecution authority will itself decide whether or not the legal conditions are fulfilled.

Limited right of appeal

There is essentially no provision for an appeal against a Swiss request to assume a prosecution, because this might delay proceedings and make it more difficult to secure evidence, for example. Only a suspect who is ordinarily resident in Switzerland is able to go before the Federal Criminal Court to challenge the submission of such a request. The Swiss criminal prosecution authority may also appeal to the Federal Criminal Court against the FOJ's decision not to submit a request. There is no provision for a Federal Supreme Court appeal

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against a Federal Criminal Court ruling.

Effects of transferring prosecution

If a foreign state assumes responsibility for a prosecution, the Swiss authority is then unable to take any further action against the suspect for the same offence. If the suspect is convicted or acquitted abroad, or if the proceedings are terminated because of a lack of evidence, then Switzerland is bound by this decision. However, if the foreign state rejects the request to assume prosecution, or is not able to conclude legal proceedings, the Swiss authority may resume its legal action. A request may be withdrawn if the suspect is arrested in Switzerland or can be extradited from a third state to Switzerland, providing proceedings in the requested state have not yet resulted in a binding judgment.

3. Assumption of a prosecution by Switzerland

Foreign requests to assume responsibility for a prosecution are received by the FOJ and, providing that Swiss criminal jurisdiction can reasonably be established, are forwarded on to the competent Swiss prosecuting authority. Via the FOJ, this authority then notifies the foreign authority whether or not it will accommodate the request. Exceptions apply to cases involving Germany, Austria and Italy. Here, bilateral treaties permit the request to be submitted directly to the competent local prosecuting authorities.

If Switzerland does not clearly have criminal jurisdiction over the case, the request may still be accepted in certain, isolated cases. Specifically, Switzerland may assume the prosecution of a foreign national resident in Switzerland if the minor nature of the offence does not justify extradition, and prosecution in Switzerland would appear to improve the prospects of social reintegration. In such cases, the FOJ will decide in consultation with the prosecuting authority whether or not to accept the foreign request.

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